

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7228
~~77-7428~~

United States Court of Appeals

FOR THE SECOND CIRCUIT

CALLMAN GOTTESMAN and PAUL J. PEYSER,

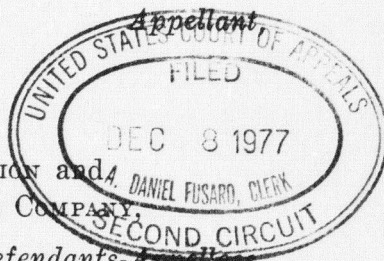
Plaintiffs,

CLENDON H. LEE,

—v.—

GENERAL MOTORS CORPORATION and
E.I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees.



REPLY BRIEF FOR APPELLANT LEE

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REPLY BRIEF FOR APPELLANT LEE

Both defendants would reinstate *Swift v. Tyson*, 16 Pet. 1, 41 U.S. 1, 10 L.Ed 865 (1842) on the fragile tundra that a modern day Thoreau could not recover counsel fees under *Aleyska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975).

But, when this Court held (414 F.2d 956, at 964) there was "... a real present danger of impairment of competition ..." and on the same page that "... the crux of the violation existed on June 3, 1957 ... and continued to exist until after the Court decreed complete divestiture by du Pont in 1961", this Court necessarily compelled as a *minimum* the application of Delaware law where Chancellor Seitz—not faced with a "real present danger"—held "benefit to the corporation" when "the matter has

been removed from the area of possible substantial doubt" *Saks v. Gamble*, 38 Del. Ch. 504, 154 A.2d 757 at 760 (1958).

What is sought here is "restitution" for counsel's successful compelling of a judicial accounting for the dealings *inter sese* of two Delaware corporations, including, for the first and only time, scrutiny under antitrust and fiduciary standards.

The thrust of defendants' arguments is that the government suit made all this unnecessary. Indeed, more than a dozen years before divestiture, General Motors took an internal glance-around and so concluded.

But defendants ignore that until the decision in 414 F.2d 956, their defense was that Clayton 7 related only to "competition" as such, and had no relationship to dealings *inter sese*.

Since the General Motors directors did not sue, either when the government suit was brought or at any time thereafter, and while General Motors and du Pont after the first Supreme Court decision were still seeking in 1959 to avoid divestiture in Chicago, this Court pointedly noted in 1959 that defendants did not attack failure to make demand upon the General Motors Board (268 F. 2d 194, 195), and that any stockholder "ratification" would be ineffectual (268 F. 2d at 197).

Thus, when a decade later in 1969 this Court held:

"Here, however, what was unlawful was du Pont's status as stockholder of General Motors, and that status continued until divestiture" (414 F.2d 956, 965),

it was more than apparent that such "status" was not *passive*. The status had been *active* by the hundreds of millions of dollars.

Only if du Pont had been a wholly inert investor, with no commerce between the two Delaware corporations, could defendants be heard to contend that the therapeutic regimen of this litigation was unnecessary, or gratuitous, and this Court held the "question" was not "... whether this action should be stopped, but merely who ought most properly to press it forward" (268 F. 2d at 197).

The "internal affairs" rule can have no clearer application than to Chancellor Seitz's decision in *Saks, supra*. Not only is the choice of law rule binding, as in *Hausman v. Buckley* (2 Cir., 1962) 299 F. 2d 696, cert. den. 369 U.S. 885, but the substantive rule in New York is the same as in Delaware. *Abrams v. Textile Realty Corp.*, 197 Misc. 25, 93 NYS 2d 808 (1949), cited together with *Saks, supra* in *Mills v. Electric Auto-Lite*, 396 U.S. 375, note 22 at 395 (1970). The denial of certiorari (Nov. 2, 1977, Dkt. 77-331) in *Mills*, after shareholders' counsel fees had been awarded for "establishing the cause of action" in the derivative suit which produced no ultimate recovery, has now placed *Mills* in the identical posture of this case.

In *Hausman*, selection of the New York rule to apply Venezuelan law presented:

"The issue is not just 'who' may maintain an action or 'how' it will be brought, but 'if' it will be brought."
(299 F. 2d at 701)

Here, the law of the case (268 F. 2d at 197) is "who ought most properly to press it forward", which the General Motors Board elected not to do while seeking to continue under the umbrella ownership of du Pont.

Unless the "law of this case" is a mere attractive nuisance, counsel who rendered the services are entitled to restitution for the value of the services from General

Motors which "... has benefited from them and ... would have had to pay them had it brought the suit" (*Mills, supra* at 397).

The tone of the General Motors brief is set in the words "The Supreme Court quarreled ..." with the district court (p.13) and that the Supreme Court "conceded." This, they say, led to "The lack of necessity for any accounting ..." which is precisely what this Court ordered (414 F.2d 956) in requiring the trial court to reexamine the proof on trial under correct standards.

To say (GM brief 13) there was "... lack of necessity for any accounting ...", would, if true, mean that this Court's decision at 414 F.2d 956 (1969) was an advisory bulletin and this Court erred in not directing summary judgment, just as it earlier erred in failing to order dismissal on the face of the complaint a decade earlier and two years before the divestiture decree, holding who "*ought* most properly to press it forward." In such circumstances General Motors cannot complain it was an "involuntary client", where it did not even attack failure to make demand on its Board of Directors who for another two years until 1961 fought manfully at the side of du Pont to stave off divestiture. Upon the plain and obvious facts, the "*ought*"-ness held by this Court can scarcely be attenuated and distorted to mere "inevitability". (GM br., p.6).

The fullness and necessity of the judicial accounting is shown by the merest sketch of the proven basic facts completed in the accounting. Du Pont, for the first and only time, was required to justify the prices charged to General Motors (Pltfs. br. submitted in 1969 appeal pp. 31-44, resulting in decision at 414 F.2d 956).

The trial court found that the cost of production of paints sold to General Motors was the same as paints sold to

other automotive manufacturers (279 F.Supp. at 380) and the Supreme Court had held (366 U.S. 316, at 331):

"It will be in their interest to vote in such a way as to induce General Motors to favor du Pont, the very *result* which we found *illegal* on the first appeal".
(emphasis added)

This "*result*" of "favoring" du Pont enabled it to charge General Motors about a dollar a gallon more for the largest product—topcoats—than du Pont could charge on competitive sales to other automotive manufacturers, enabling du Pont to receive more than double (56.8% vs. 26.7%) the mark-up over mill cost (1969 brief, pp. 37-38). The same pattern obtained with respect to all products of fabrics and finishes, both as to margin of profit and as to price indices. The complete analysis of costs, prices, price trends and related volume of sales to General Motors, as contrasted with the same data relating to sales to others, constituted a massive judicial accounting for hundreds of millions of dollars, required as the "*result*" of du Pont's "*illegal*" hold on General Motors.*

Such compulsory accounting of contemporaneous objective facts demonstrating higher prices charged General Motors was accompanied by oral admissions by du Pont officials that "book prices" were charged to General Motors while du Pont had to submit competitive bids (1969 brief, pp. 40-42) to other automotive manufacturers [all of which bids prior to 1963 were destroyed by du Pont during the pendency of this action and the Government suit], and testimony that upon sales to others "*The competitive position would not allow that kind of price*" (1969 brief, pp.

* We do not doubt the power of this Court presently to enter judgment holding du Pont liable to General Motors for fact of damage. *United States v. Ohio Power Company*, 353 U.S. 98 (1957).

13-14) and the difficulty of obtaining business from Ford and Chrysler because "our prices were high." As to the establishment of this cause of action, no party has taken issue with the adequacy of Appellant Lee's 125 page affidavit in support of application for legal fees in this case showing the contemporaneous diary detail of some 3,300 hours of services in this *Gottesman* case, wholly exclusive of Lee's additional services in having drafted, signed and filed February 23, 1963 as attorney of record the *Schiff* complaint (63 Civ. 533) which contained appropriate allegations of liability of du Pont from 1936 through stock ownership and tolling.

No part of the information of higher sales prices by du Pont to the captive General Motors than sales prices in competitive markets had ever, before the trial of this case, been disclosed to General Motors as a corporate entity nor to its shareholders, either in proxy statements or otherwise, thereby affording an additional gravitation toward the *Mills* case. Nevertheless, in an unexampled solecism it was concluded that satrap and capitulary suppliers, under du Pont's price umbrella, were not proven to sell for less.

Just as the district court in Chicago following the first remand required separate and independent counsel to report (See 177 F.Supp. 1, 6, 8, 9 and 366 U.S. 316, 319-320), so here the necessity of this judicial accounting required counsel. The constitutional minimum requirement under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) is that Delaware law be applied. Further, since it was only to the General Motors shareholders that the notice of dismissal was sent, equitable discretion is not limited as to the magnitude of the award against du Pont whose illegal acts compelled the accounting.

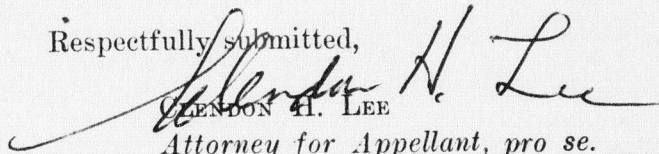
General Motors has been unjustly enriched by the benefit of the services rendered on its behalf and is primarily liable and du Pont should bear the ultimate expense because its illegal acts and business transactions compelled the proceeding.

CONCLUSION

The decisions denying application for legal fees should be reversed and the case remanded for determination of the amount thereof.

December 6, 1977

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Glendon H. Lee", is written over the typed name.

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December 7, 1977

FOR HAND DELIVERY
DECEMBER 8, 1977

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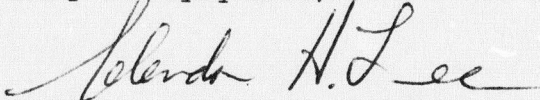
Re: Gottesman v. General Motors Corp.
77-7428

Dear Mr. Fusaro:

Enclosed for filing please find ten(10) copies, including subscribed copy, of Appellant Lee's Reply Brief, together with letter of transmittal to other counsel which I hereby certify was served December 7, 1977.

Kindly return to the messenger the additional copy with the Clerk's stamp.

Very truly yours,


Clendon H. Lee

CHL:cp
enclosures

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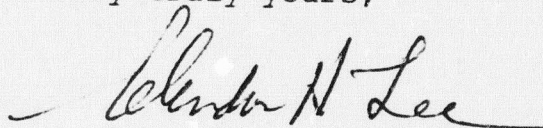
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77-7428

Gentlemen:

Enclosed are two (2) copies for each of you of Appellant
Lee's Reply Brief served hereby.

Very truly yours,



Clendon H. Lee

CHL:cp

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